Under the provisions of section 34 such vehicle is to be taken to be forfeited and condemned *unless* the owner gives notice in writing as provided in that section. In view of the provisions of this section the Court would be exceeding its powers by holding an enquiry.

In this particular case van SA 8445 was seized on the 19th March, 1951; it is not contested that the owners thereof did not make a claim as provided in section 34. According to that section, therefore, the vehicle must be taken to have been forfeited and condemned on the 19th April, 1951, so that when the learned Magistrate held the enquiry on the 20th November and the 19th December, 1951, and ordered the release of the van, he was making an order against the express provisions of the statute.

The Trade and Customs Enactment makes provision of hard cases; such cases can be dealt with *ex gratia* under section 36 which enables the High Commissioner to order any vessel, vehicle or goods seized or detained under that Enactment, whether condemnation had taken place or not and notwithstanding the fact that any suit or claim is pending, to be released upon such terms and conditions as may be prescribed in the order.

For the above reasons, I set aside the order of the of the learned Magistrate releasing van SA 8445.

Magistrate's order set aside.

LEE GUEK HON v. PUBLIC PROSECUTOR.

[A. Cr. J. (Buhagiar, J.) December 14, 1952]

[J.B. — Criminal Appeal No. 22 of 1952]

Trade and Customs Enactment Johore, s. 39(i)(e) — Possession of uncustomed goods — Burden of Proof.

This was an appeal against the conviction of the appellant on a charge of being in possession of uncustomed goods, to wit, a Movado watch. The defence of the appellant was that he bought the watch from a trader.

Held: as the appellant had given an explanation which showed that he did not know the goods were uncustomed he should been acquitted.

Case referred to:—

Rex v. Cohen (1951) 1 K.B. 505; 1951 1 A.E.R. 203.

A. J. Braga for the appellant.

M. Suffian (D.P.P.) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Buhagiar, J. : — This is an appeal from a decision of the learned Magistrate, Kluang, convicting the appellant on a charge for an offence punisable under section 39(i)(e) of the Trade and Customs Enactment of the State of Johore (Enactment No. 80).

The charge against the appellant was that on the 17th December, 1951, in Chop Poh Hang, No. 14 Jalan Mersing, Kluang, he was in possession of uncustomed goods, to wit eleven wrist watches. The learned Magistrate found the appellant guilty of being in possession of one *Movado* wrist watch, in respect of which duty was not paid; the appellant was acquitted in respect of possession of the other ten watches because the learned Magistrate was quite satisfied with the explanation given by the appellant as to how he came to be in possession of them. The appellant was sentenced to a fine of $130 and in default to one month's rigorous imprisonment.

I think I should state at this stage that the trial before the learned Magistrate was unsatisfactory in many respects and in ordinary circumstances I would have ordered a new trial before a new Magistrate, but in view of the fact that (a) the Public Prosecutor has not considered it necessary to appeal against the order of acquittal in respect of the ten watches and (b) this is an appeal from a retrial, I do not consider it fair to order a new trial. In this judgment I shall, except as hereinafter indicated, proceed on the evidence admitted in the trial and on the facts as found by the learned Magistrate.

The learned Magistrate based his judgment on the receipt D1 (written in Chinese characters) where the *Movado* watch is described as a "gold case watch", while in the watch in question only the rim is gold. The learned Magistrate held therefore that D1 did not cover the *Movado* watch.

The main ground of appeal was that the interpretation of Ex. D1 was not correct; the appellant applied to call evidence on the correct interpretation of the Chinese characters on this point; this I allowed and Teo Cheng Tong, Interpreter, Supreme Court, explained that D1 referred to two *Movado* "gold top" water proof watches; if it was intended to refer to a watch the whole case of which was of gold, the Chinese expression would be "kan hok" (i.e. gold shell). Mr. Braga for the appellant submitted that had the correct interpretation of Exhibit D1 been before the learned Magistrate, it is logical to assume that the appellant would not have been convicted.

The facts briefly are as follows: At about noon on the 17th December, 1951, a Senior Customs Officer, accompanied by other officers, acting on information received, carried out a search in the appellant's house. Certain invoices were found and seized and others were destroyed or thrown away. Eleven watches in respect of which it was alleged customs duty had not been paid were seized. The appellant was asked whether he had other invoices and he replied that he had not. In the

course of the trial the prosecution tendered some of the invoices which allegedly referred to the eleven watches in question; these invoices were issued by Singapore firms. At the time of the search the appellant, when asked about the watches referred to in the invoices issued by Singapore firms, stated that he had not yet withdrawn those watches; he made a statement to the Senior Customs Officer, but the learned Magistrate after admitting that statement held that it was not made voluntarily. In view of that finding, the statement must be ignored. In the course of the trial, however, the appellant gave evidence and with regard to the *Movado* watch, in respect of which he has been convicted, stated that he had bought that watch from a Kuala Lumpur dealer and tendered an invoice (Ex. D1) which was admitted. The appellant stated that he recovered D1 from amongst the invoices which had been crumbled and thrown away. In cross-examination the Senior Customs Officer denied that D1 was amongst those thrown away. There is nothing in the record to show the reason why the Senior Customs Officer decided to destroy or throw away any of the invoices found in the appellant's house.

Before proceeding further, it is important to refer to the law relating to the burden of proof in such cases; on reading the record, one cannot but come to the conclusion that this was not clear either to the prosecution or to the learned Magistrate. The law on this point is clearly set out in *Rex v. Cohen*[1]. There the Court (Lord Goddard, C.J., and Hilbery and Parker, JJ.) "indicated that to prove conscious harbouring it would usually be enough to show that the goods which were subject to duty were found in possession of the accused. If they were so found, that would establish a *prima facie* case that he knowingly harboured the goods, though he could rebut this by proving that he did not know of their presence, for instance, by showing that somebody had "dumped" them without his knowledge or privity. Once it was proved that he knowingly harboured the goods subject to duty, section 259 of the Customs Consolidation Act (corresponding to section 45 of the Trade and Customs Enactment) threw on him the onus of proving that the goods were in fact customed. To do this he would have to prove that the duties had actually been paid, or, at least, that they had been declared and that the customs officers, in exercise of a discretion which, as was well known, they were allowed, had permitted the goods to enter."

Lord Goddard observed 'that a simple way of proving lack of knowledge was to prove that the goods had been bought in the ordinary course of trade. If a man bought a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled if, in fact, they had been? His Lordship then referred to a passage in an earlier judgment of his, in *Rex v. Fitzgerald* (unreported), in which he said: "If a man buys something from a trader in the ordinary way, it does not matter whether it is wholesale or retail, you would presume that he has bought it honestly and that the duty on it has been paid." In *Rex v. Cohen*[1] His Lordship observed that it might have been more accurate if he had said: "that he had no knowledge or reason to believe that the duty had not been paid."'.

Applying these principles to the present case, it was sufficient for the prosecution for the purpose of proving conscious harbouring of the *Movado* watch to show that the appellant was knowingly in possession of that watch. There is ample evidence to that effect, and a *prima facie* case would have been established without the necessity for the prosecution to produce any invoices as to the origin of that watch. The only question to be decided is whether the appellant discharged the onus placed on him to show that customs duty had already been paid or that he had no knowledge or reason to believe that the duty had not been paid.

The appellant stated that the *Movado* watch in question was acquired by him at Kluang from a Kuala Lumpur dealer, and in support of this he produced a receipt (Ex. D1). Ex. D1 was not proved, but even it had been I do not think that much reliance can be placed on it as there is nothing to show that of the two *Movado* watches therein mentioned one is the watch in question; watches are usually numbered and this *Movado* watch has a number; no indication is contained in the receipt D1 as to the numbers of the watches sold. The explanation given by the appellant, therefore, amounts to this: "I am not the importer and therefore I cannot produce a receipt for the payment of duties. I bought this watch from a trader in the ordinary way."

Now, as stated in *Rex v. Cohen (ubi supra)* "once it is proved that the accused was knowingly in possession of dutiable goods which he has not proved had paid duty, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be told that if it either satisfies them that he did not know the goods were uncustomed or leaves them in doubt whether he knew, he should be acquitted." Now it is clear from the grounds of judgment given by the learned Magistrate that the only reason why he convicted the appellant in respect of the *Movado* watch is that that watch was not covered by the receipt Ex. D1, and that was on the ground stated above. I have no doubt in my mind that if the interpretation of Ex. D1 which was given before me had been present before the learned Magistrate, he would have acquitted the appellant also in respect of this *Movado* watch.

It is also likely that the statement of the appellant alone (i.e. not supported by Ex. D1) would have left the learned Magistrate in doubt as to whether the appellant knew that the watches therein mentioned were uncustomed.

I allow the appeal and discharge and acquit the appellant. The *Movado* watch is to be released and returned to the appellant and the fine paid is to be refunded.

Appeal allowed.

ABU BAKAR BIN ALIF v. R.

[A. Cr. J. (Spenser Wilkinson, J.) October 10, 1952]

[Penang — Criminal Appeal No. 31 of 1952]

Criminal procedure — Appeal against sentence — Principles which should guide Appellate Court — Necessity of evidence of antecedents and character.

Various grounds of appeal were raised in this appeal and the learned appeal Judge after dealing with each of them dismissed the appeal. One important point which arose out of the judgment was the learned Judge's directions as to the principles which should guide an Appellate Court in considering the sentence passed by the Court below. The accused in this case had been convicted under section 161 of the Penal Code for illegal gratification and sentenced to 4 months r.i. Following the principles laid down in R. v. Ball[1], the learned Judge held that he was unable to say whether the sentence was excessive or inadequate. No information was available on the record as to the accused's background antecedents or character. The principles stated in R. v. Ball[1] were: (1) the Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge had seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it; (2) the first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. Our law does not therefore, fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the Court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person.

Case referred to:—

(1) *R. v. Ball* 35 Cr. App. R. 164.

CRIMINAL APPEAL.

E. A. de Buriatte for the appellant.

C. M. Sheridan (D.P.P.) for the Crown.

Cur. Adv. Vult.

Spenser Wilkinson, J. [after dealing with other matters which are not relevant to this report, continued]: — The final ground of appeal is that the sentence is excessive. The learned Deputy Public Prosecutor on behalf of the Crown submitted that if the conviction were upheld he would suggest that this sentence was manifestly inadequate. The learned Magistrate has unfortunately given no reasons for imposing the sentence that he did and therefore before I can interfere I have to consider whether on the face of it this sentence is clearly wrong.

In the case of *Rex v. Ball*[1] the Court of Criminal Appeal restated the principles which should guide an Appellate Court in considering the sentence passed by the Court below. "In the first place", the judgment reads, "this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene". In my opinion these remarks apply with equal force to appeals to the High Court from the Subordinate Courts. I am unable to say in this case that the sentence was excessive or inadequate to such an extent as to satisfy me that there was a failure to apply the right principles.

There is an additional reason in this case why I should not interfere with the sentence. No information is available on the record as to the accused's background, antecedents or character. Whether in this instance the learned Magistrate omitted to call for such information or whether it was not available I do not know; but I have frequently remarked upon the absence of information of this kind which might assist the Courts in arriving at a proper assessment of sentence, and this case is a good example. The case of *Rex v. Ball*[1] abovementioned arose from different sentences having been imposed upon two prisoners convicted of the same crime at the same time. The principles of punishment set out in the judgment in that case are so important that I think it right to quote further from that judgment at some length. The judgment proceeds as follows:—

"In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced